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No. 86-1034

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

AMERICAN BOOKSELLERS ASSOCIATION, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF THE INSTITUTE FOR YOUTH ADVOCACY, *AMICUS CURIAE*, IN SUPPORT OF APPELLANT

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Question Presented

Is it unconstitutional for a State to discourage the in-depth exposure of juveniles to sexually graphic, harmful materials by imposing time, place and manner regulations on their commercial, public display?

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BRIEF *AMICUS CURIAE*

The Institute for Youth Advocacy, Covenant House, respectfully submits this brief *amicus curiae* in support of the Commonwealth of Virginia in this case. The consents of Appellant and Appellees have been obtained and have been submitted to the Clerk on this date.

Statement of Interest

The Institute for Youth Advocacy is a part of Covenant House, the largest organization in the country serving homeless and runaway children. Since 1972 Covenant House has provided crisis shelter, health care, counselling, educational/vocational assistance, and legal services to over 60,000 children, mostly adolescents aged 12 to 20. Founded by Fr. Bruce Ritter, a Franciscan priest, Cov-

enant House takes as its mission reaching out to vulnerable teenagers and young children who find themselves cut off —sometimes temporarily but often permanently—from their families and exposed to the most dangerous currents of streetlife in urban America, from crime to drugs to prostitution. Internationally recognized for his work—which is supported almost entirely by private contributions —Fr. Ritter was named an American "hero" by President Ronald Reagan in his 1984 State of the Union Address, and served as a member of the Attorney General's Commission on Pornography.

In 1981 this Court granted leave for Covenant House to appear *amicus curiae* representing sexually exploited children in the landmark child pornography case *New York* v. *Ferber*, 458 U.S. 747 (1982). As a result of that effort, and because of demands that Covenant House represent publicly the needs of vulnerable children and youth, the Institute for Youth Advocacy was founded in 1982. The Institute currently serves as a center for research and advocacy on issues closely related to the needs of teenagers on the streets, and others at risk of homelessness or exploitation. In significant part through its efforts Congress enacted the Child Protection Act of 1984, and the Child Abuse Victims Rights Act of 1986—both designed to provide federal help against sexual exploitation of children, and to strengthen federal child pornography laws. The Institute has frequently been asked to testify before Congressional committees on questions concerning the welfare of children.

As part of Covenant House, the Institute seeks to participate in this case because of the importance of shielding children and teenagers from premature exposure to commercial hard-core pornography. It is the experience of Covenant House that such material glamorizes prostitu-

tion and validates sexual exploitation—thus making young people all the more vulnerable to such exploitation at home and on the street. None of the parties in the case have observed, as have all who work with children at Covenant House, the ravages inflicted by America's enormous sex industry on millions of children who furtively consume its products—and on the thousands who, through child pornography and prostitution, are consumed by it. Nor are the parties likely to be as fully aware as Covenant House of the agony suffered by parents who sincerely hoped to spare their children the premature sight of graphic sexual activity, whether in a Times Square doorway, an "adult" moviehouse, or the neighborhood bookstore—all to no avail. For these reasons the Institute for Youth Advocacy of Covenant House respectfully submits this brief *amicus curiae* in support of the Commonwealth of Virginia.

Statement of the Case

Amicus accepts and adopts the Statement of the Case provided by Appellant in its Jurisdictional Statement 3-5, with the following additions.

Prior to 1985 the laws of the State of Virginia prohibited sale or loan to a juvenile of any sexually explicit material (1) that depicts human nudity, sexual conduct, or sado-masochistic abuse and (2) that is "harmful to juveniles." Va. Code §18.2-391(a). In 1985 Virginia amended its law to prohibit as well the knowing "display for commercial purpose" of such material "in a manner whereby juveniles may examine and peruse" it. *Id.* Less than one month after enactment of that amendment Appellees commenced this lawsuit, and on September 16, 1985, the U.S. District Court for the Eastern District of Virginia issued a judgment finding the "display" amendment unconstitutional and

enjoining its enforcement. *American Booksellers Ass'n, Inc.* v. *Strobel*, 617 F. Supp. 699 (E.D. Va. 1985). The State of Virginia appealed to the Fourth Circuit Court of Appeals.

On September 30, 1986, the Court of Appeals issued its final opinion affirming the decision of the District Court with respect to issuance of injunctive relief against enforcement of the "display" amendment. *American Booksellers Ass'n, Inc.* v. *Virginia*, 802 F.2d 691 (4th Cir. 1986). (An order of the District Court denying attorney's fees to Appellees, however, was reversed. *Id.*) In the course of its opinion the Court of Appeals acknowledged:

> Because of its recent passage, no one has been prosecuted under the Virginia amendment. Additionally, there was *little specific evidence* presented below, making it difficult to determine what percentage of materials in a given retail outlet might be subject to the amendment's restrictions.

802 F.2d at 696 (footnote omitted) (emphasis added). In a footnote, the Court of Appeals noted that the "district court heard testimony from three witnesses in order to 'flesh out' the pleadings and provide a more complete record." *Id.* Neither the District Court nor the Court of Appeals discussed in their opinions the force of Virginia's claim that the challenged statute is necessary to protect its children from harm. *See especially, American Booksellers Ass'n, Inc.* v. *Strobel*, 617 F. Supp. at 702-703. Nor was any specific evidence cited that sales of any materials to adults will decline if the statute is enforced. 617 F. Supp. at 703-704.

Summary of Argument

The uncontrolled exposure of children to sexually graphic materials—those defined as "harmful" to minors under the challenged statute—has been recognized as dangerous by social scientists, by four government commissions in the United States, Canada and Great Britain, by hundreds of state legislators, and by this Court in *Ginsberg* v. *New York*, 390 U.S. 629 (1968). Virginia's prohibition of the commercial display of such materials in a manner permitting minors to "peruse" them—that is, to examine them closely—is a carefully limited attempt to keep this exposure under the control of responsible adults. The State's interest—protecting children—is of an extremely high order.

The First Amendment interests affected, by contrast, are slight. Juveniles, under *Ginsberg*, have no constitutional right to examine the materials carefully defined by the challenged statute. Adult customers of the businesses affected may have to walk over to an "adults only" section of the store, or ask a sales clerk for access to a particular item—but these inconveniences are trivial compared with zoning restrictions on "adult" businesses already approved by this Court. Indeed, no credible evidence has been offered that such restrictions actually inconvenience anyone: appellees make no showing that sales of "adult" materials have declined in states with "display laws." The segregation of "adult" material might in fact make it much *easier* for adult customers to find it.

Even if the speech interests of adults in this case were substantial, they would be insufficient to invalidate what is ultimately a straightforward, fully constitutional regulation of commercial speech. The commercial display of books, magazines and films to minors is an archetype of

"commercial speech" as defined by this Court. Because sale of statutorily defined "harmful" materials to minors is illegal, the commercial display of such materials to minors may also be outlawed. Even if such sale were legal, the challenged statute would easily pass the three-part test of *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U.S. 557 (1980). Given the strength of Virginia's interest in protecting its young, this is a strikingly inappropriate occasion for judicial invalidation of a statute based on facial "overbreadth."

Introduction

> *Yet were I grossly destitute of all*
> *Those human sentiments that make this earth*
> *So dear, if I should fail with grateful voice*
> *To speak of you, ye mountains, and ye lakes*
> *And sounding cataracts, ye mists and winds*
> *That dwell among the hills where I was born,*
> *If in my youth I have been pure in heart,*
> *If, mingling with the world, I am content*
> *With my own modest pleasures, and have lived*
> *With God and Nature communing, removed*
> *From little enmities and low desires,*
> *The gift is yours; . . .*[1]

It is a central insight of Wordsworth's *Prelude* that the images we behold in childhood by chance, along with the words we are carefully taught, ultimately shape our character. Beautiful or ugly, sublime or squalid, those images will form the basis of our response to an adulthood "'mid indifference and apathy" and the "melancholy waste of hopes o'erthrown."[2]

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[1] W. Wordsworth, *The Prelude*, Book Second 421-432 (1798-1805).

[2] *Id.*, at 434-35.

That insight has been central, as well, to American constitutional law since *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943), where the Court recognized the power of an image confronting children—in that case, the American flag—as a "short cut from mind to mind." 319 U.S. at 632. Twenty-five years later, in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), a decision crucial to this case, the Court specifically recognized the power of sexually explicit images over children—finding that "exposure" to such images could constitute an "abuse" against which a state might reasonably act to protect its children. 390 U.S. at 640-43.

This case differs from *Ginsberg* in only one detail: the prohibited "exposure" of graphic sexual material to children takes the form of encouraging them, in a commercial setting, to "examine and peruse" the material—that is, according to the dictionary definition of "peruse," to "examine [it] with attention and in detail" [3]—rather than, as in *Ginsberg*, to purchase it. Va. Code §18.2-391(a). *Ginsberg*, of course, examined the fundamental issue of whether "freedom of expression constitutionally secured to *minors*," 390 U.S. at 637 (emphasis added), was impaired by such a regulation. Here, by contrast, the only interest asserted is that of adults to be free of the "unavoidable collateral effect" imposed by "display laws"—that of restricting their ability to see a public display of materials that are properly forbidden as to children but constitutionally protected as to adults. *American Booksellers* v. *Strobel*, 617 F. Supp. 699, 706 (E.D. Va. 1985), *aff'd sub. nom. American Booksellers* v. *Virginia*, 802 F.2d 691 (4th Cir. 1986). The lower courts in this case—rejecting

[3] Webster's New Collegiate Dictionary 849 (1980). The statute's use of "peruse" seems carefully calculated to prevent its application to incidental or extremely brief displays of harmful material.

the views of two other circuits[4]—somehow managed to find this "collateral effect" to be of crucial constitutional magnitude.

A more careful consideration of the competing values at stake suggests a rather different conclusion. Empirical evidence, supported by every major public study of the issue, strongly indicates that protection of minors from viewing graphic sexual material—outside an educational or carefully controlled setting—is a governmental responsibility of a high order. By contrast, the interest of adult customers—much less of appellee booksellers—in open, wholly unregulated display of such materials is almost ludicrously slight. Finally, the *display* for sale of books and magazines, is *commercial* speech subject to far more substantial legitimate state regulation than would be, for example, actual *sale* of the material. In view of the risks to children involved, Virginia's display law is a permissible, indeed a laudable exercise of that State's regulatory power on behalf of children.

I.

Virginia Has a Strong Interest in Protecting Children From Uncontrolled Access to Graphic Sexual Material.

When this Court first addressed the problem of minors' access to sexually explicit material in *Ginsberg*, it recognized the impossibility of applying "scientifically certain criteria," 390 U.S. at 643, in an area where certainty is a scientific impossibility. Likewise it was the "consensus" conclusion of a recent panel of social scientists reporting to the Surgeon General that "it is really rather difficult

[4] *Upper Midwest Booksellers Ass'n v. Minneapolis*, 780 F.2d 1389 (8th Cir. 1985); *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983).

to say much definitive about the effects of pornography on children. The direct research is not present, and probably never will be." [5] The very reason for the absence of research is, nevertheless, a telling one for this case: the clear consensus among scientists that "showing pornography to children is a morally distasteful and at present an ethically unsupportable manipulation," particularly because "the potential negative outcomes are too diffuse, and the theory too sparse to protect the children taking part. . . ." [6]

That these ethical fears are not chimeras, but real dangers threatening children, is a fact supported by the substantial weight of the evidence—most of it indirect—that does exist. Thus a wide array of studies of older adolescents attending college have shown significant correlations between exposure to sexually explicit magazines and beliefs that women enjoy forced sex[7] as well as actual past rape

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[5] E. Mulvey & J. Haugaard, *Report on the Surgeon General's Workshop on Pornography and Public Health* 38 (1986) (hereinafter "Surgeon General's Report").

[6] *Id.* at 6. *See* 2 *Pornography and Prostitution: Report of the Special Comm. on Pornography and Prostitution to the Minister of Justice and Attorney General of Canada* 570-71 (1984) (hereinafter the "Canadian Report").

[7] *See* N. Malamuth, *Do Sexually Violent Media Indirectly Contribute to Antisocial Behavior?* in *Surgeon General's Report*, *supra* note 5, at 10 (discussing extant studies); D. Zillman & J. Bryant, *Effects of Massive Exposure to Pornography*, in *Pornography and Sexual Aggression* 115, 133-134 (N. Malamuth & E. Donnerstein ed. 1984). One particularly dramatic study—completed in Canada—showed that college students had far more dramatic reactions to viewing pornography, including a significant increase in their "reported likelihood of rape," than did older subjects. J. Check, Psychoticism and Habitual Pornography Consumption as Mediators of the Effects of Exposure to Violent and Nonviolent Pornography, Paper Presented at Meeting of Int'l Soc. for the Study of Individual Differences, Sant Feliu de Guixols, Spain 54-56 (June 1985).

behavior.[8] Not surprisingly, the most recent evidence suggests that, as compared with nonoffenders, serious sex offenders of all varieties have had substantially greater exposure to nonviolent pornography at pubescence.[9]

On a less extreme, but perhaps more alarming level, the Surgeon General's panel recently reached consensus that, in laboratory experiments, repeated exposure to "pornography" alters "the beliefs of late adolescents about the frequency of certain uncommon sexual practices in the general population."[10] The work of Professor Dolf Zillman goes further, showing that repeated exposure of college students to sexually explicit materials produced attitudinal changes that included significantly higher rates of acceptance of: (1) pre- and extramarital sex; (2) nonexclusive sexual intimacy; (3) deviant sexual practices; (4) women's "sexual servitude"; and (5) the relative triviality of rape.[11] More directly still, a recent scientific sur-

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[8] M. Koss & T. Dinero, Predictors of Sexual Aggression Among a National Sample of Male College Students, Presented at N.Y. Acad. of Sciences Conf., New York City 16 (Jan. 7, 1987) (study of 2972 male college students). For a full discussion of similar studies, see Attorney General's Commission on Pornography, 1 *Final Report* 939-952 (1986) (hereinafter "Attorney General's Report").

[9] W. Marshall, *The Use of Pornography by Sex Offenders*, in *Transcript of Proceedings, U.S. Dep't of Justice, Attorney General's Comm'n on Pornography, Public Hrg., Houston, Tex.* 117A, 117S-117T (Sept. 12, 1985). *See also*, 1 *Attorney General's Report*, *supra* note 8, at 957-963 (discussing studies on early exposure to pornography among sex offenders).

[10] Surgeon General's Report, *supra* note 5, at 56.

[11] *Effects of Repeated Exposure to Nonviolent Pornography*, in *Transcript of Proceedings, U.S. Dep't of Justice, Attorney General's Comm'n on Pornography, Public Hrg., Houston Tex.* 128A, 128C-128G (Sept. 11, 1985) (hereinafter "Houston Pornography Hearing"). *See*, 1 *Attorney General's Report*, *supra* note 8, at 994-1003 (discussing this and other studies of "longer-term exposure").

vey of 400 boys and girls aged 13 to 18 found: (1) two-thirds of the boys exposed to "X-rated" material wanted "to try some of the behaviors depicted in hardcore erotica"; and (2) 25 percent of the boys exposed (as well as 15 percent of the girls) "reported imitating the sexual behaviors they had seen in the X-rated materials." [12]

The effects of such imitation can hardly be called socially harmless. Thus a recent state-by-state study of adolescent pregnancy rates found a highly significant correlation between the level of sales of sexually explicit magazines in each state and the teenage pregnancy rate.[13] "Where they [sales of such magazines] are high," the study concluded, "rates of [teenage] pregnancy, birth and abortion are high." [14] Such correlation evidence "proves" nothing in a "scientific" sense, but in the absence of countervailing evidence of similar quality, and with regard to a population which cannot be studied directly, Virginia's legislators would be fully justified in drawing inferences supportive of the challenged law.

It is clear, finally, that teenagers are currently exposed in enormous numbers to "X-rated" materials. Thus half or more males have been exposed to sexually explicit material by age seventeen, and indeed minors may be the *most* frequent consumers of such material.[15] The survey

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[12] J. Bryant, *Effects of Massive Exposure to Pornography on Everyday Moral Judgment*, in Houston Pornography Hearing, *supra note* 11, at 157A, 157G.

[13] S. Singh, *Adolescent Pregnancy in the United States: An Interstate Analysis*, 18 Family Planning Perspectives 210, 214 (1986).

[14] *Id.* The quoted statement also refers to similar high correlations between pregnancy rates and such other social factors as crime rate, teenage suicide rate, population growth, and mobility.

[15] *See* 1 *Attorney General's Report*, *supra* note 8, at 914-921, and studies discussed therein. *See also*, 2 *Sexual Offenses Against*

(footnote continued on following page)

of teenagers discussed above revealed startling levels of exposure to pornography among the young: 91 percent of boys and 82 percent of girls had "seen a magazine which depicted couples or groups in explicitly sexual acts"; the average age of first such exposure was thirteen and a half.[16] Among girls their first exposure occurred 50 percent more often by having "stumbled on the material by accident" than from having taken any initiative in seeking it out.[17]

The Commonwealth of Virginia can hardly be faulted, then, for believing that exposure of its youngest citizens to sexually explicit material poses serious risks to their welfare and maturation; further, strong evidence exists that such exposure is far from a rare event. These conclusions of this legislature are different in no essential from those of every major government commission to have studied the issue of pornography in the United States, Canada, and Great Britain;[18] as well as those of hundreds of other legislators.[19] Thus even the 1970 Presidential

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(footnote continued from previous page)

Children: Report of the Comm. on Sexual Offenses Against Children and Youth to the Minister of Justice and Attorney General of Canada 1261, (1984) (41 percent of Canadian males, 21.6 percent of females had purchased explicit pornography before age 18); *id.* at 1274-75 (6 percent of Canadians had been exposed to pornography against their will, most before age 18) (hereinafter "Canadian Sexual Abuse Report").

[16] Bryant, *supra* note 12, at 157E.

[17] *Id.*

[18] *See The Report of the Commission on Obscenity and Pornography* 62-68 (C. Barnes ed. 1970); *Report of the Committee on Obscenity and Film Censorship* 125-126 (B. Williams Chmn. 1979) (Great Britain); 2 *Canadian Report*, *supra* note 6, at 692; *Canadian Sexual Abuse Report*, *supra* note 13, at 106; 1 *Attorney General's Report* at 390-391.

[19] *See* Brief of States of Georgia, *et al.*, *amicus curiae*, Appendix 1 (supporting Appellant's Jurisdictional Statement).

Commission on Obscenity and Pornography—which recommended complete abolition of all other restrictions on the circulation of sexually explicit material—urged the prohibition of "commercial distribution or *display*" of most pornography to minors.[20]

Against this backdrop of consensus among scientists and scholars, it seems all too clear that the lower courts in this case have underestimated the interests of children that are at stake—and their "peculiar vulnerability" to harm. *Bellotti* v. *Baird*, 443 U.S. 622, 634 (1979) (opinion of Powell, J.). And it is apparent, too, that they have forgotten "the importance of the parental role in child rearing," *id.*—a role that in the area of sexuality may be emasculated when children can freely peruse graphic materials that their parents would never wish them to see.

II.

Any First Amendment Interests Affected by the Challenged Statute Are Insubstantial—and Affected Only to an Extent Necessary for Protection of Children.

In the twenty years since *Ginsberg* v. *New York* evidence to suggest deep concern about exposure of the young to sexually graphic material has, if anything, grown. Yet here the Appellees insist that a different concern should take precedence—the "right" of "adults and older juveniles" to have "access" to constitutionally protected materials. (Appellees' Motion to Affirm or Dismiss at 5.) In view of *Ginsberg* and subsequent decisions of this Court

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[20] Report of the Commission on Obscenity and Pornography, *supra* note 18, at 62 (emphasis added). *See* 2 *Canadian Report*, *supra* note 6, at 692 (urging prohibition of display "in such a manner that [visual pornographic material] is accessible to, or can be seen or examined by anyone under 18 years of age").

concerning sexually explicit materials—and in view of the record of this case—that concern is at best trivial, and at worst facetious.

First, of course, the purported rights of minors to have access to such materials was *precisely* the issue decided in *Ginsberg*. 390 U.S. at 637. Like the statute here, the New York law upheld in *Ginsberg* made no distinction between younger and older juveniles—and, to be sure, Appellees cite no evidence suggesting that 17-year-olds are any less vulnerable to the effects of pornography than young children. (They may well be, after pubescence, *more* vulnerable.)[21] Moreover, it is impossible to imagine how a teenager's constitutional rights are *not* impaired by prohibiting a store owner from *selling* harmful material to her, and at the same time *are* impaired by telling the store owner not to let her "peruse" it. If that is Appellees' argument, they might as well call honestly for the Court to overrule *Ginsberg*—for at least with regard to the constitutional rights of *juveniles*, there can be no principled distinction between the cases.

With respect to adults, of course, this case *is* different from *Ginsberg*: here the restrictions on commercial display cannot be crafted so that adults are utterly unaffected. Neither of the courts below nor any of the parties have suggested any practical way of preventing minors from carefully examining harmful material in a commercial establishment without somehow affecting the access of adults

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[21] Before pubescence, of course, children may not even realize what they are seeing when confronted by pornography. It is during adolescence that one major study found pornography to be most traumatic in its impact: thus over half of those who were exposed to pornography "against their wills" and over half of those who reported having been "shown pornography . . . and sexually assaulted by the same person" were aged 14 to 20 at the time of the incident. *Canadian Sexual Abuse Report*, *supra* note 15, at 1274-1279. *See also*, Cheek, *supra* note 7, at 54-56 (college students far more strongly affected by pornography than adults).

to it. Thus the issue here cannot be whether a "more selective approach," *Schad* v. *Borough of Mt. Ephraim*, 452 U.S. 61, 74 (1981), is possible. Virginia has chosen the *only* approach realistically suited to prevent commercial display of harmful material to minors, and the corresponding effects on adults are inevitable.

Inevitable—but not in the least degree significant. To be sure, the Court of Appeals suggested that forcing bookstores to place harmful materials in an "adults only section," in sealed wrappers, or "under the counter" is a "real and substantial" infringement on "first amendment rights." 802 F.2d at 696. Yet such restrictions differ from those previously allowed in *Renton* v. *Playtime Theatres, Inc.*, —— U.S. ——, 89 L.Ed.2d 29 (1986), and *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976), only in being far *less* real, far *less* substantial. Here, as in *Renton* and *Young*, the State is acting against the "secondary effects" of the sale of "adult" materials, not by attempting to reduce the overall volume of such sales, but by imposing a regulation on the manner in which they occur. *See Renton*, 89 L.Ed.2d at 37. In three crucial respects, moreover, the law challenged here is *more* congenial to First Amendment values than those upheld in *Young* and *Renton*.

First, in contrast with *Renton*, the circumstances do *not* "suggest that the [law] was designed to suppress expression." 89 L.Ed.2d at 47 (Brennan, J., dissenting). Neither Appellees nor the courts below have offered any explanation for passage of the challenged statute except that offered by Virginia: desire to protect children from being harmed as a secondary effect of certain types of marketing of "adult" materials. In this case it cannot be plausibly asserted, as it could be in *Renton* and *Young*, that a desire to reduce lawful circulation of "adult" materials had *any*

role, even a subsidiary one, in passage of the law. Virginia may well have hoped the law would reduce circulation of such materials among minors: e.g., by limiting their awareness of the existence and nature of the materials, and limiting their ability to try to fool store clerks into selling them. But that motivation is precisely what *Ginsberg* approved, and no other one has ever been mentioned below.

Second, the strength of the evidence for harmful "secondary effects" from Appellees' business practices is far stronger here than the corresponding evidence in *Renton* and *Young*. In this case there are no vague (if still fully legitimate) concerns for the "quality of urban life" based on studies of disputed validity, *Renton*, 89 L.Ed.2d at 46-47 (Brennan, J., dissenting). Rather it is the consensus of scientists and reputable policymakers that uncontrolled exposure of children to sexually graphic materials is seriously dangerous. Not even Appellees have attempted to suggest otherwise. Thus the "secondary effects" feared here are, if anything, far graver and far more grounded in hard reality.

Finally, the restrictions imposed by the challenged statute are much less burdensome than those permitted in *Young* and *Renton*. There the bookseller was forced to move his whole store; here he is required to move a few books. Creation of a special "adult" section within a store seems a laughably small burden to impose, particularly when many video outlets, magazine stands, and bookstores already set aside separate space for such materials—not to mention the self-imposed rating system of the motion picture industry. In *Renton* it was possible to be concerned that the challenged ordinance would wholly eliminate "adult" theatres from the city, 89 L.Ed.2d at 48-49 (Brennan, J., dissenting); by comparison the restrictions challenged here are exceedingly slight.

But even if *Young* and *Renton* were wrongly decided—as Appellees apparently believe *Ginsberg* was—where is the evidence for any substantial interference with speech rights in this case? The Court of Appeals itself conceded that "little specific evidence" was presented on behalf of Appellees' claim. 802 F.2d at 696. Most tellingly, Appellees have presented no evidence showing a decline in sales of "adult" materials after passage of "display laws" in other states. Instead, they present speculations: *e.g.*, that adults will not walk over to a special "adult" section of a bookstore, or will be reluctant to ask store clerks for help. *Id.* Have they presented one credible piece of evidence showing that to be the case? Don't adults currently seek out sections marked Children, Health, Romance, Sex and Marriage in thousands of bookstores everyday? Don't adults ask store clerks for help constantly in finding items not clearly on display? Virginia's law may, if anything, make it *easier* for customers to find the sexually explicit materials they came into the store to examine or buy.

On this record the evidence is ludicrously slight that the challenged statute will affect the actual access of adults to sexually explicit material. By contrast, the evidence for harm to children from their uncontrolled consumption of such material is as strong as the limits of scientific research—and of public policy analysis—will permit. Surely a facial challenge for overbreadth demands more—especially where children are at risk. *See New York* v. *Ferber*, 458 U.S. 747, 769-774 (1982).

III.

Virginia's Statute Is a Reasonable Limitation on Commercial Speech.

By failing to take account of the State's important interest in protecting children from exposure to sexually explicit materials, and by grossly overestimating the effects of Virginia's law on adults, the courts below reach an indefensible result—even within the analytic framework they employed. That framework itself, however, was their most egregious error—an error so fundamental that it may justify summary action by this Court. For in regulating the commercial display of pornography Virginia is regulating pure *commercial speech* as it has been defined by the decisions of this Court. And viewing the case from that standpoint it would be impossible to justify invalidation of the statute even if the "speech" interests of adults were more than trivial.

This Court has long recognized "the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation and other varieties of speech." *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U.S. 557, 562 (1980), *quoting Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 455-456 (1978) (citations omitted). The commercial display in a window or on a shelf of appliances, food, clothing, jewelry—and of books, magazines, and films—is squarely within the area of "commercial speech" marked out by the distinction. Appellees are not librarians, eager for the public to come in and *browse*. They display materials solely for purpose of proposing their *sale*. What they stock and how they show it off has nothing to do with ideology or even a desire to entertain—it has to do, rather, with a desire for profit.

The challenged statute, by limiting its application to commercial display, is thus purely, and merely, a regulation of commercial speech.

As commercial speech, the display of harmful material to minors is quite clearly subject to state control. For the sale of such material to minors is unlawful, and the "government may ban . . . commercial speech related to illegal activity, *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U.S. 376 (1973)." *Central Hudson Gas, supra*, 447 U.S. at 563-564. Thus this case is actually much more straightforward than that which closely divided the Court last Term, *Posadas de Puerto Rico Ass'n* v. *Tourism Co. of Puerto Rico*, —— U.S. ——, 92 L.Ed.2d 266 (1986). In *Posadas* advertising was regulated with regard to an activity which could *theoretically* be declared unlawful, 92 L.Ed.2d at 238; here, Virginia only forbids the proposal of a commercial transaction *already* outlawed. See *Pittsburgh Press*, 413 U.S. at 388.

Yet even were the display to minors of carefully defined "harmful" materials *not* illegal, the statute in question would easily survive the three prongs of *Central Hudson analysis*. 447 U.S. at 563-564. *See Posadas de Puerto Rico*, 92 L.Ed.2d at 280. Thus it is obvious—and uncontradicted by appellees—that the government's interest in protecting children from exposure to such materials is "substantial." *Central Hudson*, 447 U.S. at 564. Second, prohibiting the commercial display of harmful materials in a manner that children may peruse them does "directly advance" that interest. *Id.* Finally it is impossible to imagine how "the governmental interest could be served as well by a more limited restriction," *id.*—and certainly neither the courts below nor Appellees have suggested how. In view of the strength of the State's interest here, the challenged remedy plainly meets the fundamental *Cen-*

tral Hudson requirement that "the regulatory technique must be in proportion to [the State's] interest." *Id.*

Because the issue in this case is *commercial* speech, the concerns of the courts below for supposed speech interests of adults are seriously misplaced. As this Court recognized in *Central Hudson*, "commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is 'not particularly susceptible to being crushed by overbroad regulation.' *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 381 (1977)." 447 U.S. at 564 n. 6. Appellees doubtless will find other ways besides uncontrolled display to sell their sexually explicit books. They can, under the law, loudly hawk the materials in person or over speakers in the store. They can paint red arrows pointing to the "adults only" corner. They can even advertise the materials over radio and television, and in all the newspapers. All they *cannot* do is cynically lure young potential customers onto the premises with the promise that they may examine harmful materials—hoping, perhaps, that they will buy something else once in the store—or cause young customers to come on such materials unawares.

CONCLUSION

This is a case not about speech, but about business, the business of exhibiting harmful, sexually graphic material to children. The statute challenged here threatens no adult with loss of access to words, ideas, photographs, or entertainment. Rather it represents a praiseworthy effort by the Commonwealth of Virginia, using the narrowest means available, to help parents protect their children's minds and hearts—to shield them "from little enmities and low desires." [22] The First Amendment does not forbid this gift.

The judgment of the Fourth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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[22] *The Prelude*, *supra* note 1, at 431.

Certificate of Service

I hereby certify that on the 20th day of April, 1987, three copies of the annexed *amicus curiae* brief were mailed, postage prepaid, to:

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